

No.

83-146

Office - Supreme Court, U.S.

FILED

JUL 25 1982

ALEXANDER L. STEVAS.  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

S&S MACHINERY CO.,

*Petitioner,*

—against—

MASINEXPORTIMPORT and THE ROMANIAN  
BANK FOR FOREIGN TRADE,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI FROM A JUDGMENT  
OF THE UNITED STATES COURT OF APPEALS

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Did the United States Court of Appeals for the Second Circuit err in holding that the Agreement on Trade Relations between the United States of America and the Socialist Republic of Romania entered into force on August 3, 1975 (the "Agreement") does not constitute an explicit waiver by Romania of any immunity from prejudgment attachment it or any agency or instrumentality of the Romanian government possesses within the meaning of 28 U.S.C. § 1610(d)?

Did the United States Court of Appeals for the Second Circuit err in holding that the United States District Court for the Southern District of New York was barred by operation of 28 U.S.C. § 1609 from enjoining Masinexportimport ("Masin"), The Romanian Bank for Foreign Trade ("Romanian Bank") or any other entity, including

banks existing and organized pursuant to  
the laws of the United States, from  
negotiating certain letters of credit?

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PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, ("Court of Appeals") a copy of which is contained within the Appendix to this petition at pages a22-a55, is reported at 706 F.2d 411 (1983). The opinion of the United States District Court for the Southern District

of New York, ("District Court") a copy of which is contained within the Appendix to this petition at pages a1-a21, is currently unreported.

#### JURISDICTION

The opinion of the Court of Appeals was entered on April 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

#### STATUTORY AND TREATY PROVISIONS INVOLVED

The pertinent provisions of the statutes and the treaty involved are set forth in the Appendix to this petition at pages a56-a69.

#### STATEMENT OF THE CASE

In or about May, 1981, S&S Machinery Co. ("S&S") entered into a series of purchase agreements with Masin whereby S&S agreed to buy and Masin agreed to sell, certain lathes, drills and machine parts (the "machinery") for approximately



\$855,380.46. The purchase price of the machinery was to be paid by letter of credit issued to the Romanian Bank for the account of Masin.<sup>1</sup> Depending on the purchase agreement, 15% of 20% of the purchase price was due upon shipment of the machinery and initial presentation of documentation; the balance of the purchase price was due either 360 days or 12 months thereafter.

The machinery was shipped by Masin to S&S during the period of July 1, 1981 through September, 1981. After this shipment, the Romanian Bank, on behalf of and as collection agent for Masin, was paid between 15% and 20% of the purchase price in accordance with the purchase agreements. S&S contends that the machinery

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<sup>1</sup> To obtain the necessary letters of credit, S&S was required to deposit over \$500,000 in an interest-bearing account with the Bankers Trust Company, which sum it is not allowed to withdraw.

without exception, is wholly defective, unusable, unsafe, and without value.

This action was commenced by S&S on July 15, 1982 in the Supreme Court of the State of New York, County of New York, to recover damages resulting from Masin's breach of the purchase agreements. On that same date, S&S made an application for an Order of Attachment against Masin and the Romanian Bank, which application was granted on July 15, 1982, on the ground that respondents are foreign corporations not authorized to do business in the State of New York (New York Civil Practice Law and Rules § 6201(1)). A copy of said order is contained within the appendix hereto at pages a70-a74. Pursuant to the Order of Attachment, the Sheriff for the County of New York was authorized to levy upon property belonging to Masin or the Romanian Bank in an amount not to

exceed \$1,042,146.00. Further, in connection with the Order of Attachment, S&S posted a bond totalling \$156,339.00 to protect, in part, the interests of respondents.

On July 16, 1982, the Sheriff of the County of New York served the Order of Attachment upon the Bankers Trust Company, which was then in possession of more than one million dollars of assets belonging to the respondents. These assets included the letters of credit S&S had obtained from Bankers Trust Company as required by the purchase agreements it entered into with Masin, referred to above. Thereafter, on July 21, 1982, as required by New York law, S&S brought a timely motion to confirm the Order of Attachment in the Supreme Court of the State of New York.

On July 27, 1982, respondents, by order to show cause, brought a motion in

the District Court, in which they sought removal of this action from the Supreme Court of New York and an order vacating the Order of Attachment issued by said court. A hearing was held on respondents' motion on July 28, 1982. By order dated July 29, 1982, the District Court granted respondents' motion insofar as it sought removal, and denied it in all other respects. This order modified the Order of Attachment previously issued by the Supreme Court of the State of New York by ordering only the attachment of the letters of credit which S&S, pursuant to the purchase agreements, had executed in favor of the Romanian Bank for payment on the account of Masin, and enjoining the negotiation by any person, including the Bankers Trust Company, of the letters so attached. A copy of said order is

contained within the appendix hereto at pages a75-a79.

On September 13, 1982, respondents brought a motion in the District Court seeking to vacate the Order of Attachment and dismiss the action for lack of personal jurisdiction, or in the alternative, stay the action and compel arbitration. A hearing on this motion was held before the Honorable Whitman Knapp on October 22, 1982. By memorandum and order dated December 7, 1982, the District Court (Knapp, J.) denied the motion to dismiss against Masin, referred the issue of personal jurisdiction over the Romanian Bank to a Magistrate, granted the motion to vacate the Order of Attachment it had previously issued, and denied the motion to stay the action and compel arbitration. A copy of this memorandum and order is

contained within the appendix hereto at pages a1-a21.

On December 14, 1982, a conference was held before Judge Whitman Knapp, at which S&S requested a stay of so much of the order dated December 7, 1982 which vacated the attachment and dissolved the injunction issued by the District Court pending the determination of S&S's appeal to the Court of Appeals. The District Court, by order dated December 17, 1982, stayed that portion of the Order which vacated the Order of Attachment it had previously issued until January 4, 1983.

A Notice of Appeal from the memorandum and order of Judge Knapp dated December 7, 1982 was served and filed on December 28, 1982, in which petitioner appealed from so much of said order which held that Masin and the Romanian Bank are agencies or

instrumentalities of the Romanian government, and which vacated the attachment, and dissolved the injunction issued by the District Court on the ground that Masin and the Romanian Bank are immune therefrom by application of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. ("FSIA").

Petitioner moved the Court of Appeals for an order staying the enforcement of the order of Judge Knapp dated December 7, 1982, pending the determination by the Court of Appeals of said motion, and pending determination of petitioner's appeal to said court. At a hearing held on January 4, 1983 the Court of Appeals granted this motion in all respects.

On April 26, 1983 the Court of Appeals, per the Honorable William H. Timbers, affirmed the determination of the District Court, and held a) that both

Masin and the Romanian Bank are agencies and instrumentalities of the Romanian government; b) that the Agreement does not constitute an "explicit waiver" of immunity from prejudgment attachment within the meaning of the FSIA, and therefore, Masin's property was immune from prejudgment attachment by operation of the FSIA; and c) the District Court was barred from issuing injunctive relief of the type sought herein by operation of the FSIA. This determination also vacated the stay previously issued by said court. A copy of this decision is contained within the appendix hereto at pages a22-a55.

On May 11, 1983, petitioner made an emergency application to recall the mandate issued by the Court of Appeals and stay reissuance of said mandate pending determination of said motion and for



thirty days, pending application to this Court for a writ of certiorari.

On May 12, 1983, S&S applied for and was granted a stay, by the District Court, of the enforcement of its order of December 7, 1982 vacating the attachment, which was then operable by virtue of the issuance of the mandate of the Court of Appeals, pending the determination by the Court of Appeals of petitioner's motion to recall said mandate.

On May 20, 1983, the Court of Appeals denied petitioner's motion for a recall of the issuance of the mandate.

On May 23, 1983, petitioner applied to this Court for an emergency stay of the enforcement of the order of District Court vacating the attachment and dissolving the injunction previously issued by that court, which application was denied on May 24, 1983.

It should be noted that despite the fact that the order of attachment issued below was vacated, S&S still has a substantial economic interest in the outcome of the instant petition. Pursuant to New York Civil Practice Law and Rules § 6212(b) S&S was required to, and did, post a bond in the amount of \$156,339 which, in part, secured respondents against any damages they might sustain as a result of a wrongful attachment, which damages include attorneys' fees. As such, unless this Court decides that the order of attachment issued below was not improvidently granted, S&S could be liable to respondents for damages pursuant to CPLR § 6212(e).

#### EXISTENCE OF JURISDICTION BELOW

The action below was commenced on July 15, 1982 in the Supreme Court of the State of New York in the County of New York. By

Order dated July 29, 1982 the action was removed to the United States District Court for the Southern District of New York on the removal petition of the defendants. The basis for federal jurisdiction on removal was diversity of citizenship pursuant to 28 U.S.C. § 1332.

On December 28, 1982 S&S filed its Notice of Appeal to the United States Court of Appeals for the Second Circuit. The basis for jurisdiction on appeal was twofold: (i) an order vacating an order of attachment is appealable under Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) and (ii) an appeal from an order dissolving an injunction is permitted by statute, 28 U.S.C. § 1292.

## REASONS FOR GRANTING THE WRIT

Supreme Court Rule 17 states, in relevant part:

1. A review on writ of certiorari ... will be granted only when there are special and important reasons therefor. The following indicate the character of reasons that will be considered.

\* \* \*

- (c) When a ... federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

As will be demonstrated below, there are two important questions in the case at bar which merit review by this Court and hence the instant motion should be granted in all respects.

The decision of the Court of Appeals dated April 26, 1983, which affirmed the memorandum and order of the District Court

dated December 7, 1982, 1) holds that respondents are agencies or instrumentalities of the Romanian government; 2) affirms the vacatur of the attachment by the District Court on the ground that the Agreement does not constitute an "explicit waiver" within the meaning of the FSIA, and 3) affirms the dissolution of the injunction by the District Court on the ground that it was barred from issuing said relief by operation of the FSIA.

The decision of the Court of Appeals rests, in large part, on its interpretation of the Agreement. Prejudgment attachment is available under 28 U.S.C. § 1610 (d) against a foreign sovereign or agencies or instrumentalities thereof, when (i) the attachment is obtained to secure satisfaction of a judgment which may ultimately be rendered in plaintiff's favor and not to obtain

jurisdiction over the sovereign and (ii) the sovereign has waived its immunity therefrom.<sup>2</sup> The Agreement provides in relevant part:

Nationals, firms, companies and economic organizations of either Party, ... shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions.

The Court of Appeals held that this clause does not constitute an explicit waiver of immunity from prejudgment attachment within the meaning of the FSIA, and therefore that the property of Masin, which it found to be an agency of the Romanian government, was immune from such attachment.

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<sup>2</sup> As the District Court correctly found, S&S did not seek an attachment to obtain jurisdiction over the respondents, but rather, obtained the same as security for the judgment likely to be rendered in its favor (App. pages a1-a21).

This determination has vast significance, not only for the parties to this lawsuit, but for all Americans which trade with agencies or instrumentalities of the Romanian government. By its decision, the Court of Appeals has effectively held that the property of each and every one of these agencies or instrumentalities is immune from prejudgment attachment, a question of itself of sufficient importance to warrant grant of certiorari by this Court. The ramifications of the decision of the Court of Appeals, however, affect not only American trade relations with Romania, but also American commercial activities with at least fourteen other nations, as language very similar, if not identical to that found in the Agreement

is found in treaties executed by the United States and fourteen other nations.<sup>3</sup>

By barring Americans from utilizing the provisional remedy of prejudgment attachment when dealing with agencies or instrumentalities of these governments,

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<sup>3</sup> These treaties include:

Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, 8 U.S.T. 899, T.I.A.S. 3853 (1955); Friendship, Commerce and Navigation Treaties between the United States and: Nicaragua, 9 U.S.T. 449, T.I.A.S. 9024 (1956); Korea, 8 U.S.T. 2217, T.I.A.S. 3947 (1956); Netherlands, 8 U.S.T. 2043, T.I.A.S. 3942 (1956); Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. 3593 (1954); Japan, 4 U.S.T. 2063, T.I.A.S. 2863 (1953); Denmark, 12 U.S.T. 908, T.I.A.S. 4797 (1951); Greece, 5 U.S.T. 1829, T.I.A.S. 3057 (1951); Israel, 5 U.S.T. 550, T.I.A.S. 2948 (1951); Ireland, 1 U.S.T. 785, T.I.A.S. 2155 (1950); and Italy, 63 Stat. 2255, T.I.A.S. 1965 (1948).

It should be further noted that in rendering the determinations challenged herein, both the District Court and the Court of Appeals relied on decisions interpreting Article XI, Section 4 of the Treaty of Amity.



the Court of Appeals has deprived them of a significant protection provided by the American legal system. Further, this decision, as in the case at bar, could cause substantial and even irreparable injury to Americans in a similar situation to S&S who will be unable to enforce judgments against these entities in the United States.

The importance of this question is compounded by the fact that it affects the dealings of the United States with foreign governments. This is an area in which this Court has granted certiorari in the past. As this Court stated in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), on remand, 272 F. Supp. 836, aff'd, 383 F.2d 166:

We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the

proper role of the Judicial Branch in this sensitive area.

376 U.S. at 407; See also Dames & Moore v. Regan, 453 U.S. 654 (1981) (Certiorari granted to review, in part, the validity of Executive Orders vacating all attachments held by Americans on Iranian property and assets).

Finally, the decision of the Court of Appeals is contrary to that of at least three district courts, which, in interpreting the Treaty of Amity between Iran and the United States, a treaty with language extremely similar to that in the Agreement, found that such language did constitute an explicit waiver of immunity from prejudgment attachment.<sup>4</sup> This Court

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<sup>4</sup> See Harris Corporation v. National Iranian Radio & Television, 645 F.2d 1 (5th Cir. 1981); Itek Corp. v. First National Bank of Boston, 511 F. Supp. 1341 (D. Mass. 1981); Touche Ross v. Manufacturers Hanover Trust Co. & Bank Saderat, 107 Misc.2d 438 (Sup. Ct. N.Y. Co. 1980), aff'd, 86 A.D.2d 990 (1st Dept. 1982).

has considered a conflict between a Court of Appeals and District Courts a factor in determining whether to grant a writ of certiorari. See Calhoon v. Harvey, 379 U.S. 134, 137 (1964); Beal v. Doe, 432 U.S. 438 (1977); Stern and Gressman, Supreme Court Practice, 5th ed.; pages 278-279.

The proper interpretation of the Agreement is not the only important question raised by the instant petition. In its determination, the Court of Appeals held that the FSIA barred the District Court from issuing injunctive relief of the type sought by S&S herein.<sup>5</sup> In so holding, the Court of Appeals held that the FSIA deprived the District Court of

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<sup>5</sup> As to the willingness of this Court generally to grant certiorari in cases involving procedural questions in federal courts, see Schlaegenhauf v. Holder, 379 U.S. 104 (1964); Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Brownell, 357 U.S. 197, 203 (1958).

the power to enjoin not only agencies or instrumentalities of foreign sovereigns, but banks located, organized and existing pursuant to United States law. This determination is directly contrary to the express language of 28 U.S.C. §1609, the provision relied upon by the court below, which provides a foreign sovereign with immunity only from "attachment, arrest and execution." Again, the importance of this question is magnified as a result of its affect on America's relations with other nations (See Banco Nacional de Cuba, supra), and further, because it deprives litigants before American courts of a substantial protection normally provided by the American legal system. Moreover, the danger of irreparable injury to parties as a result of this determination is readily apparent as it is horn book law that such a showing is necessary to obtain

injunctive relief. Finally, by interpreting the FSIA in a manner contrary to its clear and unequivocal language, the Court of Appeals has expanded the scope of a foreign sovereign's immunity beyond that provided by Congress, and has affected American commercial relations with all foreign nations and their agencies or instrumentalities.

**1. The Agreement Constitutes An Explicit Waiver of Immunity from Prejudgment Attachment Within the Meaning of the FSIA**

One of the questions before the Court of Appeals was whether Art.IV §2 of the Agreement constitutes an explicit waiver by Romania of any immunity from prejudgment attachment it or any of its agencies or instrumentalities may possess. Article IV § 2 of the Agreement provides:

Nationals, firms, companies and economic organizations of either

Party shall be afforded access to all courts, and when applicable, to administrative bodies as plaintiffs and defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements.

The Court of Appeals held that this clause did not constitute an explicit waiver within the meaning of 28 U.S.C. § 1610(d), and therefore, pursuant to 28 U.S.C. § 1609, Masin, an agency of the Romanian government, was immune from prejudgment attachment. We respectfully submit that the court erred in reaching such a conclusion.

First, while courts have held to the contrary, at least three courts have held that Article XI ¶4 of the Treaty of Amity

between the United States and Iran<sup>6</sup> which contains language extremely similar to that contained in the Agreement constituted an explicit waiver of immunity from prejudgment attachment within the meaning of the 28 U.S.C. § 1610(d). See Reading & Bates Drilling Co. v. National Iranian Oil Co., No. 79 Civ. 6034 (S.D.N.Y. Nov. 29, 1979) (bench ruling); Electronics Data Systems Corp. v. Social Security Organizations of the Government of Iran, No. 79 Civ. 1711 (S.D.N.Y. May 23, 1979) (bench ruling), remanded 610 F.2d 94 (2d

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<sup>6</sup> Article XI par. 4 of the Treaty of Amity provides in relevant part:

No enterprise of either [the United States or Iran] ... shall, if it engages in commercial ... activities ... claim or enjoy ... immunity ... from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Treaty of Amity, Aug. 15, 1955, 8 U.S.T. 899, 909 T.I.A.S. No. 3853.

Cir. 1979); American International Group v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir). In Electronic Data Systems Corporation v. The Social Security Organization of the Government of Iran, et al., supra, the court stated:

[U]nder the provisions of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, TIAS 3853, 8 UST 901 (1955), defendants have waived immunity from attachment prior to judgment and, the requirements of 28 U.S.C. §1610(d) having been met, no immunity from attachment is available with respect to the property sought to be attached by plaintiff.

Second, the question before this Court is the intention of the United States and Romania when they entered into the Agreement with respect to immunity from prejudgment attachment. In Libra Bank, Ltd. v. Banco Nacional de Costa Rica, 676 F.2d 47 (2d Cir. 1982) the Second Circuit



held that language contained within a series of promissory notes executed by an agency of the Costa Rican government constituted an explicit waiver within the meaning of 28 U.S.C. § 1610(d). In so holding the court stated that for such a waiver to exist, an agreement does not have to contain the words prejudgment attachment. Instead, the question is to be determined by examining the intent of the parties to the agreement. The court stated:

The clear import of the district court's opinion and of defendant's argument on appeal is that the waiver, to be effective under the Act, must recite the words "prejudgment attachment" in haec verba or otherwise must contain an express reference to this form of legal proceeding. We disagree. Section 1610(d)(1) does not require recitation of the words "prejudgment attachment" as an operative formula. Although the legislative history is silent on this point, the purpose of § 1610(d)(1) is to preclude inadvertent, implied, or constructive waiver in cases where the intent

of the foreign state is equivocal or ambiguous. Under this interpretation of the statute, Banco Nacional's waiver was clearly explicit.

676 F.2d at 47, 49, (emphasis added).

Thus the question before this Court is whether Article IV par. 2 of the Agreement was intended by the parties to be an explicit waiver within the meaning of 28 U.S.C. §1610(d). We believe that it was.

Contained within the appendix hereto at pages a80-a92 is a copy of the affidavit of Stanley D. Metzger, sworn to on August 18, 1980 ("Metzger Aff.") which was filed in an action commenced in the United States District Court for the Southern District of New York entitled The Chase Manhattan Bank, N.A. v. The State of Iran, et al., 79 Civ. 6644.<sup>7</sup> Mr. Metzger,

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<sup>7</sup> Petitioner acknowledges that this affidavit was not submitted to the court below. However, at oral argument on January 4, 1983 on petitioner's application for a stay, the Court  
(footnote continued)

an attorney, was a member of the Legal Adviser's Office of the United States Department of State from 1946 to 1960. From 1952 to 1960, he was the Assistant Legal Adviser for Economic Affairs, and was the attorney principally responsible for rendering legal advice to the principal drafters and coordinators of negotiations of the Treaties of Friendship, Commerce and Navigation ("FCN") (Metzger Aff. par. 2) of which the Treaty of Amity is an example. In his own words:

I am thoroughly familiar with the circumstances surrounding, and in 1950-51 I participated in, the

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(footnote continued from previous page)  
of Appeals requested the parties to obtain a statement from the Department of State as to the United States' position concerning the proper interpretation of the Agreement. Petitioner was unable, prior to the date on which said court rendered its determination, to obtain the same. It was only after said determination that petitioner was informed of Mr. Metzger's affidavit. As petitioner believes this is telling evidence on an extremely important question, we respectfully urge this Court to consider the same.

drafting of the standard FCN treaty.

Metzger Aff., par. 2.

In his affidavit, Mr. Metzger makes clear that, in his opinion, the United States intended Article XI, par. 4 of the Treaty of Amity to constitute a complete waiver of all immunities a foreign sovereign or its agencies or instrumentalities might otherwise possess, when the foreign sovereign engaged in commercial activity. In such circumstances, it was the intent of the United States that such agencies or instrumentalities be treated just like any private corporation or entity engaged in a similar function. As Mr. Metzger states:

As I have previously explained (supra ¶6), Article XI(4) of the Treaty of Amity was intended to insure that to the extent that governments and their agencies and instrumentalities were engaged in commercial activities they would not enjoy a privileged position with respect to the normal costs of operation such as the costs of litigation and taxa-

tion. Indeed, the last clause of Article XI(4) expressly waives immunity from "taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject". Prejudgment attachment is an "other liability" incidental to the cost of litigation. So just as private parties are subject to prejudgment attachment as one aspect of the cost of litigation, Article XI(4) was intended to waive immunity from prejudgment attachment of the property of the government, its agencies and instrumentalities which property is used in a business activity in which the government, agency or instrumentality engages. A levy of attachment would reach assets of the Government of Iran and Markazi used in the performance of commercial activities normally engaged in by private parties in this country.

Metzger Aff., par. 10, (emphasis added).

This comports with the view of the court in Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979). In Behring, plaintiff claimed it was entitled to a prejudgment attachment of the property of defendant,

the Imperial Iranian Air Force ("I.R.I.A.F."), on the ground that Art. XI, par. 4 of the Treaty of Amity constituted a waiver of immunity under the FSIA. Despite holding that the Treaty of Amity did not constitute an "explicit" waiver, the court nevertheless found that said Treaty did constitute a waiver of immunity from prejudgment attachment. In reaching this conclusion, the court relied upon its perception of the intent of the parties when they enacted this Treaty. The court stated:

Applying ordinary principles of construction, I must conclude that the Treaty of Amity authorizes this attachment. Behring has argued that the "or other liability" language of article XI paragraph 4 shows that the specific language preceding it was meant by way of illustration and not limitation; that it is a nonexclusive list of situations in which immunity is waived. The listing of "execution of judgment" must waive immunity from attachment in aid of execution, compare § 1610(a), (b). The "or other

liability" language must refer to situations other than attachment after the entry of judgment - including the use of prejudgment attachments as a provisional remedy. Although I.R.I.A.F. strongly contests this construction of the provision, I believe it to be the better interpretation.

It is apparent from my reading of the Treaty that the United States and Iran desired that they be treated like ordinary private parties in the other's courts. Such treatment would of course include liability to pre-judgment attachment of property.

I therefore conclude that the Treaty of Amity authorizes prejudgment attachment of I.R.I.A.F.'s property under the circumstances of this case, and that I.R.I.A.F. is not entitled to an order releasing all restraints from its property.

475 F. Supp. at 394 (citations omitted, emphasis added).

Mr. Metzger's interpretation of the Treaty of Amity is also in accord with the Congressional purpose in enacting the FSIA. The FSIA did not outlaw prejudgment

attachment, per se. Rather, it was designed to eliminate the use of prejudgment attachment for the purpose of establishing jurisdiction over a foreign sovereign. See Jet Line Services, Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1174 (D.C.Md. 1978) and legislative history cited therein. As stated in Velidor v. L/P/G Benghazi, 653 F.2d 812, 816-817 (3rd Cir. 1981), emphasis added, "the objective of this Act [FSIA] is to facilitate the bringing of suits against foreign governments, arising out of commercial activity, in United States courts." To allow respondents to prevent S&S from utilizing the prejudgment attachment procedure to secure any judgment this Court might render in its favor, when it is clear that both Masin and the Romanian Bank are subject to the jurisdiction of this Court, would defeat the purposes of the FSIA.



Additionally, the very substance of the language in Article IV, par. 2 evidences a clear intention of the United States and Romania to expressly waive all immunities connected with legal proceedings, including immunity from prejudgment attachment. The Agreement specifically states that economic organizations ... "shall not claim or enjoy immunities from suit or execution of judgment or other liability." Both the waiver of immunity from "suit" and "other liability" each, reasonably interpreted, include a waiver of immunity from prejudgment attachment.

It is clear from a reading of this rather inartfully drafted clause that "execution of judgment" was intended as an example of "other liability". Execution, however, just like prejudgment attachment, is simply a procedural device utilized by a party in the recovery of a judgment.

The one is no more or less a "liability" than the other. If "execution of judgment" is a liability within the meaning of the Agreement, then so is "prejudgment attachment," and hence "other liability" includes prejudgment attachment.<sup>8</sup>

The clause can also be interpreted to constitute a waiver from prejudgment attachment in that the word "suit" includes prejudgment attachment. By waiving immunity from "suit," Romania waived immunity from all legal proceedings connected with a law suit, which proceedings

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<sup>8</sup> A second argument which supports an interpretation of the phrase "other liability" as including prejudgment attachment is based on the statutory ground for attachment under New York law utilized in the instant proceeding. Pursuant to New York Civil Practice Law and Rules § 6201, the property of a foreign corporation not authorized to do business in New York is subject to prejudgment attachment. Under this statutory scheme, prejudgment attachment is a "liability" which a foreign corporation faces for failing to register with the Secretary of State. Thus "other liability" includes prejudgment attachment.

by state law include prejudgment attachment. This interpretation is further supported by the first sentence of Article IV, par. 2 wherein the parties agreed that "Nationals, firms, companies and economic organizations of either party shall be afforded access to all courts ... as plaintiffs or defendants, or otherwise in accordance with the laws in force in the territory of such other party." By including the word "defendants" in Article IV, it is clear that the parties to the Agreement intended that a national or economic organization embroiled in litigation in the courts of the other contracting party should be governed by the same rules in those courts as a native of that country; he should be afforded the same protection, and conversely, be subject to the same restrictions, as those natives.

The clause further evidences an intent by Romania and the United States to treat "economic organizations" such as Masin just like Romanian "nationals, firms and companies". This intent is clear from Art. IV., par. 2 which states, in part, "Nationals, firms, companies and economic organizations of either Party ... shall not claim or enjoy immunities from suit or execution of judgment or other liability ... with respect to commercial or financial transactions." If this clause is interpreted, as respondents argue below, in such a manner that Masin, a Romanian economic organization, is not subject to prejudgment attachment, economic organizations and nationals, dealt with uniformly by Article IV, par. 2 would be treated differently for immunity purposes. That was clearly not the intent of the Agreement's provision which groups these

two types of entities together. As Romanian nationals who engage in commercial transactions in the United States have never been afforded immunity from prejudgment attachment, neither should economic organizations.

In short, by waiving immunity from "other liability" it is difficult to conceive what immunity, if any, the Romanians intended not to waive. Certainly by executing an agreement containing such a waiver, the Romanians were aware that, at the very least, they had created a substantial question in the minds of their trading partners as to whether any immunity had been preserved. If Romania had intended to preserve its immunity from prejudgment attachment, and, at the same time, waive immunity from suit and execution of judgment, logic dictates that it would have included in the

Agreement a provision expressly reserving said immunity. The absence of such a clause is a strong indication as to the intent of the parties.

Accordingly, we respectfully submit that the Agreement constitutes an explicit waiver of immunity from prejudgment attachment within the meaning of 28 U.S.C. § 1610(d) and that the Court of Appeals determination to the contrary should be reversed.

2. The FSIA Does Not Bar A Court  
From Issuing Injunctive Relief  
Of The Type Sought Herein

On July 29, 1982, the District Court modified the original Order of Attachment entered by the Supreme Court of the State of New York, County of New York. Said modification, in principal part, consisted of the issuance of an injunction "enjoining any and all negotiation of drafts or other papers pursuant to the letters of credit." The District Court vacated said injunction solely on the ground that the FSIA barred it from granting said relief. The Court of Appeals affirmed this determination stating, in part:

Once the district court held ... that the Romanian Bank and Masin were protected from prejudgment attachment by the FSIA, the court properly refused to sanction any other means to effect the same result .... We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment.

We respectfully submit that the court below erred in finding that the FSIA acted as a bar to the issuance of injunctive relief in this action, and accordingly, that decision should be reversed.

It is indisputable that the FSIA -- 28 U.S.C. § 1609 -- only provides a foreign sovereign with immunity from "attachment, arrest and execution". There is no provision in the FSIA that a foreign sovereign that is subject to a court's jurisdiction is immune from an injunction. That the FSIA does not explicitly curtail a court's powers to grant injunctive relief when a foreign sovereign is properly before it was expressly recognized by the District Court when it stated:

"... 28 U.S.C. § 1609 does not specifically grant immunity from injunctions ..."

The courts below have interpreted the FSIA in such a manner as to negate a court's



authority to issue injunctive relief against a foreign sovereign. This is not the law.

It is axiomatic that in interpreting a statute, a court must attempt to give effect to the intent of the legislature. Where that intention is clearly expressed in an unambiguous statute, the court is obligated to interpret the statute so as to give effect to the statute's plain meaning. This is true whether or not the court is of the opinion that such an interpretation is in the best interests of the public. As stated by this Court in Rubin v. United States, 449 U.S. 424 (1981):

When we find the terms of a statute unambiguous, judicial inquiry is complete, except "in rare and exceptional circumstances." No such circumstances are present here, for our reading of the statute is wholly consistent with the history and the purposes of the Securities Act of 1933.

\* \* \*

Our [the Court's] individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.

449 U.S. at 430, 431 (fn. 8), (citations omitted).

Likewise, in State of Connecticut v. United States E.P.A., 656 F.2d 902 (2d Cir. 1981), the court commented in relevant part:

Where the text of a statute is unequivocal, there is no need to speculate as to Congress' intent in enacting it. ... In construing the Clean Air Act, we are compelled to follow the statute's plain meaning "even though effectuating that meaning may have undesirable public policy ramifications."

656 F.2d 902 at 909-910.<sup>9</sup>

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<sup>9</sup> See also Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980) wherein the court stated:

(footnote continued)

Applying the foregoing to the case at bar, it is respectfully submitted that the courts below erred in not giving effect to the plain meaning of the FSIA. Section 1609 of Title 28 is clear and unambiguous; it gives the foreign sovereign immunity only from "attachment, arrest, and execution." By enumerating specific items of immunity, under the doctrine of expressio unis est exclusio alterius, one must conclude that Congress intended to exclude items not so enumerated. United States v. J.W. Robinson, 359 F. Supp. 52,

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(footnote continued from previous page)

The meaning of a statute must, in the first instance, be sought in the language of the statute itself. If the language is clear and unambiguous, a court must give effect to its plain meaning. United States v. Clarke, 445 U.S. 253, 254 (1980); Caminetti v. United States, 242 U.S. 470, 485-6 (1917) Zerilli v. Evening News Ass'n, 628 F.2d 217, 220, (D.C. Cir. 1980).

631 F.2d at 918.

59 (S.D. Fla. 1973). Thus, by excluding the term injunction, it is clear that Congress did not intend to grant a foreign sovereign immunity therefrom.

The Congressional decision, reflected in the FSIA, to treat prejudgment attachment and injunctions differently can be explained by the different burdens of proof a party must meet to obtain injunctive relief as opposed to a prejudgment attachment. While an attachment can be obtained under New York law (CPLR § 6201) merely on a showing that the defendant is a non-resident and the plaintiff is entitled to a money judgment, to obtain an injunction in the Second Circuit, a plaintiff must show:

[T]here must be a showing of possible irreparable injury and either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships

tipping decidedly toward the party requesting the preliminary relief.

Caulfield v. Board of Education of The City of New York, 583 F.2d 605, 610 (2d Cir. 1978); See also Jack Kahn Music v. Baldwin Piano & Organ, 605 F.2d 755 (2d Cir. 1979).

In enacting the FSIA, Congress decided to limit the possibility of interference in foreign affairs by the courts in situations where an attachment is used for jurisdictional purposes. However, it coupled this restriction with a statutory scheme designed to facilitate obtaining jurisdiction in United States courts over foreign sovereigns. See Jet Line Services, Inc. v. M/V El Hariga, 462 F. Supp. 1165 (D. Md. 1978).

The considerations involved in the decision to restrict the court's ability to grant prejudgment attachments, however,

are vastly different from those involved when the acts of a foreign sovereign threaten a plaintiff with irreparable injury. In such circumstances, Congress justifiably determined that the cost to plaintiffs was too great to permit it to exercise the luxury of preventing the mere possibility of a court's interference in foreign affairs. In those instances in which a plaintiff can demonstrate a right to injunctive relief, Congress has remained silent and not afforded sovereign immunity to foreign states.

At least three courts have recognized the availability of injunctive relief in cases similar to that before the Court. See Harris Corporation v. National Iranian Radio & Television, 645 F.2d 1 (5th Cir. 1981); Itek Corp. v. First National Bank of Boston, 511 F. Supp. 1341 (D. Mass. 1981); Touche Ross v. Manufacturers

Hanover Trust Co. & Bank Saderat, 107 Misc. 2d 438 (Sup. Ct. N.Y. Co. 1980), aff'd. 86 A.D.2d 990 (1st Dept. 1982).

In Itek Corp. v. First National Bank of Boston, supra, plaintiff Itek was required to obtain guarantees as part of a contract executed with the government of Iran. These guarantees were supplied by defendant Bank Melli, an arm of the Iranian government. To obtain these guarantees, Itek obtained letters of credit from defendant First National Bank of Boston ("FNB") payable to Bank Melli. Bank Melli demanded payment on the letters of credit so issued. Itek sought, and was granted, an injunction restraining defendant FNB from negotiating the letters of credit. In granting Itek injunctive relief, the court stated:

FNB contends Itek has an adequate remedy in this instance, since any

damages resulting from FNB's wrongful honor of Bank Melli's demand can be reasonably calculated. However, FNB's argument misses the mark. The fact that its damages may be reasonably calculable will provide Itek with little consolation in the event those damages ultimately prove uncollectible.

\* \* \*

Thus, if FNB were to make payment on the letters as demanded, Itek's only recourse would be a lawsuit against the Iranian Government. On the present record, we do not believe that this can be considered an "adequate" remedy. In reaching this conclusion, we take judicial notice of the fact that the present domestic situation there has rendered access to Iranian courts futile.

511 F. Supp. at 1348-1349.

The case at bar is very similar if not indistinguishable from Itek, supra. Here plaintiff was required to obtain certain letters of credit from a bank organized under the laws of the state of New York in favor of an instrumentality of a foreign sovereign pursuant to a contractual obli-



gation. Thereafter, the foregin sovereign demanded payment on the letters of credit. As in each of the cases cited above, S&S would have suffered irreparable injury if injunctive relief had not been granted.

No party challenged the propriety of the grant of injunctive relief below on the merits. The sole ground for denying this relief was that such a result was dictated by the FSIA. Such is not the case, as is fully demonstrated by Itek Corp., supra, and Touche Ross & Co., supra, and we respectfully submit that the courts below erred in so holding. The decision below dissolving the injunction should accordingly be reversed.

## CONCLUSION

This Court should review this case because of the important questions concerning the interpretation of the Agreement, and the FSIA presented by the instant petition. For these reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

S&S MACHINERY CO.,

Plaintiff,

MEMORANDUM  
& ORDER

-against-

82 Civ.  
4890 (WK)

MASINEXPORTIMPORT and THE  
ROMANIAN BANK FOR FOREIGN TRADE,

Defendant.

-----x

WHITMAN KNAPP, D.J.

Plaintiff, the purchaser of allegedly defective machinery, has brought this breach of contract action against Masinexportimport ("Masin"), the manufacturer of the machinery, and the Romanian Bank for Foreign Trade (the "Romanian Bank"), Masin's collection agent. The defendants have moved to vacate a

prejudgment attachment of letters of credit opened by plaintiff on Masin's behalf. Defendants have also moved to dismiss the action for lack of personal jurisdiction or, in the alternative, to stay the action and compel arbitration. For the reasons stated below, we deny the motion to dismiss the complaint against Masin, and refer the issue of personal jurisdiction over the Romanian Bank to the Honorable Ruth V. Washington, United States Magistrate. We further grant the motion to vacate the attachment. We deny the motion to stay the action and compel arbitration.

#### PERSONAL JURISDICTION

Both defendants have demonstrated to our satisfaction that they are "agencies or instrumentalities of a foreign state" under the meaning of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602

et seq., and thus subject to the FSIA's protections. The relevant definition is found in 28 U.S. (sic) §1603:

(a) A "foreign state": --- includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as (defined in subsection (b)).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of the United States... nor created under the laws of any third country.

It is undisputed that defendants fulfill criteria b(1) and b(3). As to b(2), defendants have supplied us with the

affidavit of Nicolae Sava, Consul of the Socialist Republic of Romania, stating that the Romanian Bank "is an organ of the Romanian Government" and that Masin "is a state foreign trade company wholly-owned and controlled by the Romanian Government." This is sufficient as to the Romanian Bank, as plaintiff appears to concede. While the statement with respect to Masin is somewhat conclusory, see Pan American Tankers Corp. v. Republic of Vietnam (S.D.N.Y. 1968) 291 F.Supp. 49, we are persuaded that it provides evidence of complete control by the Romanian Government. We note that the plaintiff has provided us with no evidence which would lead us to a contrary conclusion; and we further note that the affidavit of an official such as Mr. Sava is generally considered to be highly persuasive evidence of an entity's entitlement to immunity under the FSIA.

See Yessenin-Volpin v. Novosti Press Agency  
(S.D.N.Y. 1978) 443 F. Supp. 849, 854.

We turn, therefore, to the issue of service of process and personal jurisdiction. Service was properly effected on Masin under the requirements of 28 U.S.C. §1608(b)(2). This subsection provides that an agency or instrumentality of a foreign state may be served:

by delivery of a copy of the summons and complaint... to any agent authorized by appointment or by law to receive service of process in the United States.

Among the numerous methods of service employed by plaintiff, a copy of the summons and complaint was served upon the New York Secretary of State, who is designated by New York Business Corporation Law §307 as the agent for service of any corporation otherwise subject to personal jurisdiction. Such further provision for jurisdiction is made by New York Civil

Practice Law and Rules §302(a)1. As amended in 1979, this subsection provides for personal jurisdiction over any person who "transacts any business within the state or contracts anywhere to supply goods or services in the state," in any cause of action arising from such acts. It is undisputed that the allegedly defective machinery on which the plaintiff's cause of action is based was shipped to plaintiff in New York f.o.b. Hamburg, Germany. We have been directed to no authority, nor have we discovered any, that creates an exception to the plain language of C.P.L.R. §302(a)1 simply because goods are not shipped f.o.b. New York.<sup>1</sup> Accordingly, we find that the cause of action against Masin arose from its transaction of business in New York, and thus that service upon the Secretary of State was sufficient as to it.



Plaintiff also urges that service on the Romanian Bank was properly effected under 28 U.S.C. §1608 by its delivery of a copy of the summons and complaint to the New York Superintendent of Banking (sic). We disagree.

New York Banking Law §207 provides that the Superintendent of Banking shall be deemed designated as an agent for service for any foreign banking corporation which does not have a license to transact banking business in New York but nevertheless

transact[s] in this state the business of buying, selling, paying or collecting bills of exchange, or of issuing letters of credit or of receiving money for transmission or transmitting the same by draft, check, cable or otherwise, or of making loans, or of receiving deposits, or of exercising the fiduciary powers specified in section two hundred one-b of this chapter, or transacting any part of such business, or maintaining in this state any agency or branch for carrying on such business, or any part thereof. (Banking Law §200)

All parties agree as to the activities of the Romanian Bank with respect to this

action. Pursuant to the purchase agreements between plaintiff and Masin, plaintiff opened letters of credit on Masin's behalf with the Bankers Trust Company in New York. Payment to Masin was to be made in two installments. When the first payments came due, the Romanian Bank acted as Masin's collection agent; it now seeks to act in the same capacity to collect upon the remaining letters of credit to which Masin claims it is entitled. Since these payments have been made and will continue to be made by Bankers Trust to the Romanian Bank in Romania, we find that the Romanian Bank has not transacted, and will not transact, any banking business in New York.

In addition, we find that the Romanian Bank's activities, wherever transacted, do not rise to the level of the transaction of the business of any of the banking functions listed in Banking Law §200. Although the Romanian Bank did transmit payment to Masin, it did so as part of a

single, two-step transaction rather than as a regular business activity. The New York Supreme Court has held that Banking Law §200 is not implicated in a case involving "a single isolated transaction by a foreign bank, accepting no deposits from local customers, but rather, as a designated escrowee, ...not regularly 'doing business here' [but acting] merely as a conduit in forwarding funds on deposit with [a New York bank] to the rightful recipients once the conditions of the escrow have been met." Animalfeeds International, Inc. v. Banco Espirito Santo e Commercial de Lisboa (S.Ct. 1979) 420 N.Y.S.2d 954, 959. We see no reason why this should not be equally true for a foreign bank acting solely as a conduit for the collection of funds. We find that the Romanian Bank has engaged in none of the activities which would constitute an appointment of an agent for service of process under New York Banking law.

Plaintiff further claims that service was properly made on defendants under the provision of 28 U.S.C. §1608(b)(2) which permits service upon an agency or instrumentality of a foreign state by service on "any...agent authorized by appointment," and under §1608(b)(1), which provides that services may be made "in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality." Defendants deny that any such arrangements existed and that the various individuals who were admittedly served were appointed agents for this purpose.

We defer judgment on this issue and refer this case to the Honorable Ruth V. Washington, United States Magistrate, to hear and report to us on what, if any, agents were appointed or arrangements for service were made with plaintiff by the Romanian Bank or anyone with authority to take such acts on its behalf.

ATTACHMENT OF DEFENDANTS' PROPERTY

We turn now to the substantive issues presented in defendants' motions. Defendants claim that the attachment of certain letters of credit which, it is undisputed, were their property at the time the attachment was granted, is invalid under the FSIA. We agree.

28 U.S.C. §1609 provides that, with certain exceptions, "the property in the United States of a foreign state shall be immune from attachment arrest and execution." At oral argument plaintiff for the first time raised the claim that one of these exceptions is relevant to this case. 28 U.S.C. §1610(d) provides that there shall be no §1609 immunity if:

(1) the foreign state has explicitly waived its immunity from the attachment prior to judgment, notwithstanding any withdrawal of the waiver of the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that

has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

Plaintiff claims that Article IV, Section 2 of the Agreement on Trade Relations Between the United States of America and the Socialist Republic of Romania (the "Agreement") constitutes an explicit waiver of immunity.<sup>2</sup> The Section provides:

Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts and, when applicable, to administrative bodies and plaintiffs or defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial transactions... (Emphasis supplied.)

Since we are unable to discover any cases concerning this Section of the Agreement, we accept the invitation of both parties to apply the case law concerning a strikingly similar section of the Treaty of

Amity between the United States and Iran.<sup>3</sup> The Second Circuit has very recently held that "the weight of authority is that this provision -- and in particular the phrase "other liability" -- is not an explicit waiver of immunity from prejudgment attachment. Libra Bank, Ltd. v. Bank of Costa Rica (2d Cir. 1982) 676 F.2d 47,50.<sup>4</sup> Since Libra Bank is, to our knowledge, the only case in this Circuit which has directly approached this issue, we have no hesitancy in following its holding and applying it to the instant case. We thus hold that there has been no explicit waiver of defendants' immunity from prejudgment attachment under the FSIA, and thus that the attachment of its property is invalid and must be vacated.

We likewise hold that we may not issue an injunction prohibiting the Bankers Trust Company from releasing to defendants, and defendants from collecting, the letters of credit in their favor. While 28 U.S.C. §

1609 does not specifically grant immunity from injunctions, the result of such an injunction in this case would for all intents and purposes be precisely the same as that of a prejudgment attachment. There is thus only an illusory, not a real, difference between the remedies here. See Behring International, Inc. v. Imperial Iranian Air Force (D.N.J. 1979) 475 F.Supp. 383 (temporary restraining order enjoining defendant, an agency or instrumentality of a foreign state, from disposing freely of its assets in the United States, discussed as a prejudgment attachment under the FSIA). We will not eviscerate the FSIA by permitting under one name the precise thing which is expressly forbidden under another.

#### ARBITRATION

We turn, finally, to defendants' assertion that plaintiff is bound by an agreement to arbitrate any disputes arising



from the contract between plaintiff and Masin, and thus that this action should be stayed pending such arbitration. We find that no such agreement existed between the parties and thus refuse to stay these proceedings.

Defendants claim, first, that plaintiff is bound by an arbitration clause contained in the contract of Masin with another company not party to this action, American Edelstaal ("Edelstaal"). However, we find that plaintiff did not become Edelstaal's assignee or assume this particular contractual obligation when it agreed to purchase from Masin the machinery which Edelstaal found itself unable to pay for. The facts and documents presented to us indicate that plaintiff contracted anew to buy certain merchandise indentified as that previously contracted for by Edelstaal. While plaintiff made its purchases at Edelstaal's request, the fact that plaintiff then resold the machinery to

others as well as to Edelstaal demonstrates that the Edelstaal-Masin contract was fundamentally altered and not merely completed through a middleman.

Defendants rely heavily on the fact that the bills of sale for 134 of 138 shipments from Masin to plaintiff were marked "as per American Edelstaal p.o." We interpret this as no more than an identification of the goods to be purchased. We also refuse to draw any inferences from the fact that Masin made the same boilerplate guarantee of quality to both plaintiff and Edelstaal.<sup>5</sup> Defendants' comparison of the instant case to Midland Tar Distilleries, Inc. v. M/T Lotos (S.D.N.Y. 1973) 362 F.Supp. 1311, 1312-1313, is unfounded. In that case, an earlier contract was held to be incorporated into the contract at issue by the words "subject to all the terms, liberties and conditions of the [the

charter party]." The instant case does not rise near to this level of incorporation.

We also reject defendants' contention that an arbitration provision appearing on two of Masin's acknowledgements of plaintiff's orders constitutes a course of conduct establishing that the parties had agreed to arbitrate all disputes.<sup>6</sup> The New York Court of Appeals has held that where an order form contains no reference to arbitration but an acknowledgement does include such a provision,

the inclusion of an arbitration agreement materially alters a contract for the sale of goods and thus, pursuant to section 2-207 (subd. [2], par. [b]) [of the Uniform Commercial Code], it will not become a part of such a contract unless both parties explicitly agree to it. Matter of Marlene Indus. Corp. (Carnac), 408 N.Y.S. 2d 410, 413 (1978).

And in Schubtex, Inc. v. Allen Snyder, Inc., that court, after discussing Marlene, held that no such explicit agreement could be inferred from a "prior course of dealing" which consisted of two written

confirmations, containing arbitration provisions, of order forms which did not provide for arbitration. 424 N.Y.S.2d 133, 135 (1979). We find this case to be indistinguishable from Schubtex. We hold that no arbitration agreement existed at any time between the parties, and thus refuse to stay the instant motion.

SO ORDERED.

Dated: New York, New York  
December 7, 1982

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WHITMAN KNAPP, U.S.D.J.

- 1 We note that the cases cited by defendants for the proposition that merely shipping goods into New York does not constitute sufficient contact with the state to provide personal jurisdiction, predate the 1979 amendment to the C.P.L.R. which plainly provides to the contrary.
  
- 2 In the instant case it is undisputed that the letters of credit which are the subject of the attachment are the property of Masin and are used for a commercial activity in the United States, and that the attachment was not sought for the purpose of obtaining jurisdiction over the defendants.
  
- 3 The relevant provision of the Treaty of Amity between the United States and Iran provides:

No enterprise of either [country]...shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

- 4     See, Security Pacific National Bank v. Iran (C.D.Cal. 1981) 513 F.Supp. 864, 879-80; New England Merchants National Bank v. Iran Power Generation & Transmission Co. (S.D.N.Y. 1980) 502 F.Supp. 120, 126-27, remanded (2d Cir. 1981 646 F.2d 779; E-Systems, Inc. v. Islamic Republic of Iran (N.D.Tex. 1980) 491 F.Supp. 1294, 1301-02; Reading & Bates Corp. v. National Iranian Oil Co. (S.D.N.Y. 1979) 478 F.Supp. 724, 728; Behring International, Inc. v. Imperial Iranian Air Force (D.N.J. 1979) 475 F.Supp. 383, 392-3. Contra, Reading & Bates Drilling Co. v. National Iranian Oil Co. (S.D.N.Y. Nov. 29, 1979) No. 79 Civ. 6034 (Bench ruling); Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran (S.D.N.Y. May 23, 1979) No. 79 Civ. 1711 (Bench ruling), remanded (2d Cir. 1979) 610 F.2d 94.

- 5     We further reject defendants' claim that plaintiff has relied on Edelstaal's contract in asserting a breach of this guarantee, and is thus bound by the arbitration provision of that contract. Although the guarantee that the goods in question would be "manufactured first class" does not appear in any of the correspondence or written agreements between Masin and plaintiff, it appears from plaintiff's verified complaint and other papers that it has based its cause of action on oral representations made to it, and not on any part of Edelstaal's contract.

- 6 We note, incidentally, that one of these notations refers to arbitration in Romania, whereas the arbitration agreements between defendants and Edelstaal, to which defendants claim plaintiff is bound, mandate arbitration in France.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1012 August Term 1982

Argued March 4, 1983

Decided April 26, 1983

Docket No. 82-7970

-----X  
S & S MACHINERY CO., :  
Plaintiff-Appellant, :  
v. :  
MASINEXPORTIMPORT, a Romanian :  
Corporation, and THE ROMANIAN :  
BANK FOR FOREIGN TRADE, :  
Defendants-Appellees. :  
-----X

BEFORE:

FEINBERG, Chief Judge, TIMBERS and  
CARDAMONE, Circuit Judges.



---

Appeal from an order entered in the Southern District of New York, Whitman Knapp, District Judge, vacating an attachment of certain letters of credit and dissolving an injunction against the negotiation of those letters of credit on the ground that defendants had not waived their immunity from prejudgment attachment under the Foreign Sovereign Immunities Act.

Affirmed.

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Alfred R. Fabricant, New York, N.Y.  
(Martin H. Samson, and Shea & Gould,  
New York, N.Y., on the brief), for  
plaintiff-appellant.

Walter J. Higgins, New York, N.Y.  
(Andrew J. Maloney, and Maloney,  
Viviani, Higgins & Kelly, New York,  
N.Y. on the brief), for defendants-  
appellees.

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TIMBERS, Circuit Judge:

S & S Machinery Co. ("S & S") appeals from an order entered December 7, 1982 in the Southern District of New York, Whitman Knapp, District Judge, granting the motion of defendants Masinexportimport ("Masin") and the Romanian Bank for Foreign Trade ("Romanian Bank") to vacate a prejudgment attachment of their property pursuant to the Foreign Sovereign Immunities Act of 1976, Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, (codified at 28 U.S.C. §§ 1330; 1332(a)(2)--1332(a)(4); 1391(f); 1441(d); and 1602--1611 (1976)) ("FSIA" or "Act"), and dissolving an injunction against negotiating certain letters of credit.

The questions presented on this appeal are, first, whether Masin and the Romanian Bank come within the definitions of

"agency or instrumentality of a foreign state" set forth in § 1603(b) of the Act, and therefore are immunized by the Act from prejudgment attachment; second, if the protections of the Act apply, whether that statutory immunity was "explicitly" waived in accordance with § 1610(d)(1) of the Act; and, third, whether the district court correctly refused to grant, by injunction, relief which it could not properly provide by attachment.

The district court in a reasoned opinion held that Masin and the Romanian Bank were protected under the Act, that Romania did not explicitly waive immunity, and that an injunction could not be used to immobilize defendants' assets when an attachment of those assets would be improper. We affirm.

## I.

In the summer of 1981, Masin, a Romanian foreign trading company, delivered Romanian-made lathes, drills, and machine parts to S & S, a domestic corporation. Pursuant to the purchase agreement, S & S paid for this material by certain irrevocable letters of credit issued to the Romanian Bank--as Masin's collection agent-- for the account of Masin. S & S was not satisfied with the quality of the material delivered. It commenced an action on July 15, 1982 in the Supreme Court of the State of New York, New York County, to recover damages resulting from Masin's allegedly defective performance under the purchase agreement. Concurrent with commencement of this action, S & S applied for an order of attachment authorizing a levy upon assets

in the United States owned by Masin and the Romanian Bank. The state court granted the order of attachment, pursuant to N.Y. Civ. Prac. Law § 6201(1) (McKinney 1980), authorizing the New York County Sheriff to levy upon property owned by defendants up to the amount of \$1,042,146. The next morning the Sheriff levied upon assets owned by defendants at The Bankers Trust Company in New York City.

On July 21, S & S moved in the state court to confirm the attachment. Masin and the Romanian Bank thereupon sought to remove the action to the federal court on the ground of diversity of citizenship (more accurately, alienage). They also sought in the federal court to vacate the attachment of their assets. After their removal petition was filed in the federal court, 28 U.S.C. § 1446(a) (1976), defen-

dants obtained from the federal court an order, which was served on S & S on July 27, requiring it to show cause why the action should not be removed to the federal court and why the attachment should not be vacated. After a hearing, 28 U.S.C. § 1446(c)(5)(1976), the district court on July 29 granted defendants' motion to remove the action but continued the state court's order of attachment with certain modifications. The district court also enjoined "any and all negotiation of drafts or other negotiable paper pursuant to the...letters of credit."

By a notice of motion dated September 13, defendants renewed their efforts to vacate the attachment and to dissolve the injunction against negotiation of the letters of credit. This motion, among other things, also sought dismissal of the

action for want of in personam jurisdiction over defendants, or, in the alternative, a stay of the action and an order to compel the parties to arbitrate.

On December 7, the court filed a Memorandum and Order vacating the order of attachment and dissolving the injunction against negotiation of the letters of credit. The court held that Masin and the Romanian Bank were protected by the FSIA as agents or instrumentalities of the Romanian government, and that their statutory immunity from prejudgment attachment had not been explicitly waived in accordance with § 1610(d)(1) of the Act. The court refused to dismiss the action. It referred the question of in personam jurisdiction over the Romanian Bank to a magistrate. It refused to grant a stay or to compel arbitration.

Recognizing the possibility that the entire action--and any appeal from this order--might be mooted upon the vacating of the attachment, Judge Knapp stayed until January 4, 1983 that part of his December 7 order which vacated the attachment. On January 4, we granted S & S' motion to continue the stay until this appeal could be heard and decided.

## II.

The Foreign Sovereign Immunities Act immunizes a "foreign state" from prejudgment attachment of its assets in the United States, unless that state explicitly waives its immunity. 28 U.S.C. §§ 1609, 1610(d) (1976). More than the foreign state itself is protected by the Act; its alter egos likewise are immunized. As § 1603(a) makes clear, an "agency or instrumentality of a foreign state as



elaborated in subsection (b)" itself is treated as a foreign state for the purposes of the Act. A threshold question is whether Masin and the Romanian Bank qualify as state agencies or instrumentalities, and therefore are immune from prejudgment attachment of their assets in this country.

The Act defines an "agency or instrumentality of a foreign state" to mean any entity

"(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

28 U.S.C. § 1603(b) (1976). The legislative history elaborates on the kinds of economic entities the drafters intended to include in the definition of agency or instrumentality:

"[A]s a general matter, entities which met the definition of an agency or instrumentality of a foreign state could assume a variety of forms, including a state trading corporation...a central bank [or] export association...."

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, 6614.

There is no doubt that Masin and Romanian Bank each satisfies parts (1) and (3) of the statutory test. The sole dispute turns on the application of part (2) to the facts of this case. S & S claims that appellees failed to prove either that they are organs of the

Romanian state or that they are owned by Romania. We disagree. The proof of state ownership and state control that was introduced in the district court amply supports the court's holding that both Masin and Romanian Bank are agencies or instrumentalities of Romania for the purposes of the Act. We shall consider the proof as to each appellee in turn.

(A) The Romanian Bank

It would be difficult to imagine a clearer example of a state "agency or instrumentality", as defined in § 1603(b), than the Romanian Bank for Foreign Trade. This entity is specifically defined by Romanian law as a central state institution whose mission is to effect state goals concerning payments, credit, and currency control in foreign trade. Lege,

Privind Infinitarea, Organizarea Si Functionarea Bancii Romane de Comert Exterior, art. 1 (Law No. 16 of June 21, 1968). Furthermore, by virtue of the Romanian Constitution, all banks are "State Property".<sup>1</sup> Constitutie art. VII (Romania). This evidence alone is sufficient to prove that the Romanian Bank is a state-owned instrumentality established to serve the state's foreign trade goals. Indeed this is the paradigm of a state agency or instrumentality, as indicated by the House Report, which specifically identified state central banks and export agencies in its discussion of qualifying entities for purposes of § 1603(b). H.R. Rep. No. 1487, supra, at 15-16, 1976 U.S. Code Cong. & Ad. News, at 6614. State-owned central banks indisputably are included in the § 1603(b) definition of

"agency or instrumentality." E.g.,  
Verlinden B.V. v. Central Bank of Nigeria,  
647 F.2d 320, 323 (2d Cir. 1981), sub  
judice, 51 U.S.L.W. 3662 (U.S. Jan. 11,  
1983) (No. 81-920); Banco Nacional de Cuba  
v. Chase Manhattan Bank, 505 F.Supp. 412,  
428 (S.D.N.Y. 1981) (an analogous institu-  
tion, the Banco Comercio Exterior de Cuba,  
held to be an instrumentality of the Cuban  
government).

There was additional evidence of the  
Bank's state-ownership and its position as  
a state foreign trade organ. The uncon-  
troverted affidavits of Sava, Consul to  
the Socialist Republic of Romania, of  
Radu, the managing director of the Bank,  
and of Herscovici, an expert on Romanian  
law, corroborated the Bank's assertion  
that it is owned by the state and that it  
serves the foreign trade goals of the

state. Finally, a report published by the United States Department of Commerce characterizes the Romanian Bank in the same terms.<sup>2</sup>

S & S failed to rebut any of this persuasive evidence, arguing instead that more was required to prove agency or instrumentality status. We disagree. Convincing and uncontroverted evidence established that the Bank is but a cat's paw of the Romanian government--an instrumentality owned and controlled by the state.

(B) Masin

State trading companies and export associations were identified specifically in the House Report as exemplars of the § 1603(b) definition of "agency or instrumentality." H.R. Rep. No. 1487, supra, at

15-16, 1976 U.S. Code Cong. & Ad. News, at 6614. Masin adduced convincing and uncontroverted evidence that it is a wholly state-owned export/import company, established to carry out the foreign trade goals of the state. Sava, the Romanian Consul, stated in his affidavit that Masin "is a state foreign trade company wholly-owned and controlled by the Romanian Government." Although S & S belittles this sworn statement as the catechism of a brainwashed functionary, statements of foreign officials--regardless of their political or ideological orientation--have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA. Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 854 (S.D.N.Y. 1978). Sava's conclusion, moreover, was corroborated by Straus,

manager of Masin, and by Herscovici, an expert on Romanian law, each of whom submitted affidavits to the same effect. While the objectivity of these men might be questioned, their uncontroverted explanations of the status of Masin were plausible as well as consistent with the other evidence.

Putting aside the veracity of the affiants, the district court based its decision on more than these sworn statements. Masin introduced a variety of material detailing the role of the Romanian state in foreign trade. For example Article 8 of the Romanian Constitution provides that foreign trade is a state monopoly. Constitutie art. VIII (Romania). The Romanian government itself has described the hand-in-glove relationship of the state and its



subordinate "economic units" in the conduct of foreign trade. See generally Law on Foreign Trade and Technico-Scientific Cooperation Activities in the Socialist Republic of Romania, in Official Bulletin of the Socialist Republic of Romania No. 33 (1971). This view is reflected in a report published by the United States Department of Commerce, which classified Masin as a subordinate of the Romanian Ministry of Machine Tools and Electronics. Trading and Investing in Romania, supra note 2, at 7. The report reiterates that "[f]oreign trade in Romania is monopolized by the state and supervised by the Ministry of Foreign Trade." Id. at 5-6.

S & S claims that only the presumption of state ownership that exists in all socialist economies supports the conclusion that Masin is an agency or an instru-

mentality of the state. Relying on Edlow International Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977), S & S argues that this presumption is not enough, since there are entities even in socialist economies that are distinct from the state.<sup>3</sup>

We may assume for present purposes that there are essentially private entities operating within socialist economies. This does not alter our holding that the district court correctly concluded that Masin is an agency or instrumentality of the state. For unlike Edlow, where only the presumption of state ownership was relied upon to prove agency or instrumentality status, Masin established its status as a state-owned and state-controlled trading company with specific evidence. Such a state trading company

expressly qualifies as an "agency or instrumentality" of the state, as the legislative history makes plain.

We hold that both the Romanian Bank and Masin are agencies or instrumentalities of Romania within the meaning of FSIA.

### III.

Having held that the district court correctly concluded that the Romanian Bank and Masin are agencies or instrumentalities of the Romanian state, it follows that they are entitled to protection as "foreign state[s]" within the meaning of 1603(a) of the Act. Among the protections accorded to foreign states by the Act is the immunity from attachment provided in § 1609:

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the

property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609 (1976). Foreign states accordingly are immune from prejudgment attachment of their assets in the United States, unless the immunity is explicitly waived as provided in § 1610:

"(d) The property of a foreign state, as defined in Section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a state...if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been

or may ultimately be entered against the foreign state, and not to obtain jurisdiction." (emphasis added)

Libra Bank Ltd. v. Banco Nacional de Costa Rica, 676 F.2d 47, 49 (2 Cir. 1982). The requirement that the waiver of immunity from prejudgment attachment be explicitly made is underscored both by the plain language of § 1610(d) and by the contrast between § 1610(d) and § 1610(a).<sup>4</sup> A foreign state's immunity from attachment as an aid in the execution of judgment can be waived implicitly as well as explicitly, while the immunity from prejudgment attachment can be waived only by unmistakable and plain language. Id. at 49-50 & n. 4 (discussing statute and legislative history).

In Libra Bank we held that a foreign state did not have to intone the precise

words "prejudgment attachment" in order to waive immunity. Id. at 49-50. We held in Libra Bank, however, and we reiterate here, that a waiver of immunity from prejudgment attachment must be explicit in the common sense meaning of that term: the asserted waiver must demonstrate unambiguously the foreign state's intention to waive its immunity from prejudgment attachment in this country. We do not take lightly the congressional demand for explicitness. It would be improper for a court to subvert this directive by substituting a judicially reconstituted gloss on a facially unclear document for an unequivocal waiver by the foreign state.

The question we must decide here is whether Romania explicitly has waived its immunity from prejudgment attachment. S & S claims that an explicit waiver of

immunity can be found in the "Business Facilitation" clause of the subsisting United States--Romania trade agreement, which provides that

"Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and, when applicable, to administrative bodies as plaintiffs and defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements."

Agreement on Trade Relations Between the United States and the Romanian Government, April 2, 1975, Art. IV, § 2, 26 U.S.T. 2305, 2308-09, T.I.A.S. No. 8159. Obviously waivers of immunity from suit or from execution of judgment have no bearing upon the question of immunity from pre-

judgment attachment. The only language in the above treaty that might be construed as a waiver of immunity from prejudgment attachment is the waiver of immunity from "other liability in the territory of the other Party."

The treaty between the United States and Romania itself provides no clue as to what was meant to be included in the category "other liability". Other courts do not appear to have had the occasion to construe this treaty. Since an identical clause is found in the Treaty of Amity between the United States and Iran, however, we turn for guidance to that treaty and what interpretation thereof there has been. In relevant part, the Treaty of Amity provides:

"No enterprise of either [the United States or Iran] ... shall, if it engages in commercial, industrial, shipping or other



business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit execution from judgment or other liability to which privately owned and controlled enterprises are subject therein."

Treaty of Amity, Aug. 15, 1955, United States--Iran, Art. XI, § 4, 8 U.S.T. 899, 909, T.I.A.S. No. 3853 (emphasis added). Referring to the clause "or other liability" in the Treaty of Amity, we stated in Libra Bank, although we were not there required to decide the matter, that "[t]he weight of authority is that this provision--and in particular the phrase 'other liability'--is not an explicit waiver of immunity from prejudgment attachment." 676 F.2d at 50 (citations omitted).

We must now decide in the instant case the question to which we intimated an

answer by way of dictum in Libra Bank. We hold that the waiver of immunity from "other liability" does not explicitly waive immunity from prejudgment attachment. The phrase "other liability" is ill-suited to encompass prejudgment attachments. As we pointed out in Libra Bank, it is by no means clear that prejudgment attachments are liabilities. The better view seems to be that such attachments, outside of their now-discredited use in quasi in rem jurisdiction, are provisional remedies authorized to assure that prevailing parties will have meaningful recoveries. 7 Moore's Federal Practice § 64.04[3] (2d ed. 1982). We are not required to decide today the precise role of prejudgment attachments. We hold only that the "other liability" language does not unequivocally express the will of

the parties to waive immunity from prejudgment attachment.

In so holding, we are in accord with the majority of courts (all district courts) that have addressed the issue. Security Pacific National Bank v. Iran, 513 F. Supp. 864, 879-80 (C.D. Cal. 1981); New England Merchants National Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 126-27 (S.D.N.Y. 1961), remanded on other grounds, 646 F.2d 779 (2d Cir. 1981); E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294, 1300-02 (N.D. Tex. 1980); Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 728 (S.D.N.Y. 1979); Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 392-93 (D.N.J. 1979) (holding that the waiver of immunity from "other liability" did not

explicitly waive immunity from prejudgment attachment, but supporting the attachment on other grounds). Contra, Reading & Bates Drilling Co. v. National Iranian Oil Co., No. 79 Civ. 6034 (S.D.N.Y. November 29, 1979) (bench ruling); Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran, No. 79 Civ. 1711 (S.D.N.Y. May 23, 1979) (bench ruling), remanded on other grounds, 610 F.2d 94 (2 Cir. 1979).

S & S claims that Libra Bank requires reversal in the instant case because in Libra Bank we held that immunity had been waived even though the words "prejudgment attachment" had not been intoned. In Libra Bank, however, the language of the agreement was virtually all-inclusive, waiving "any right or immunity from legal proceedings." 676 F.2d at 49. Such an

expansive waiver is hardly comparable to the scant and hazy "other liability" language of the United States--Romania Trade Agreement.

We hold, in view of the delphic character of the phrase "other liability", that the Romanian Bank and Masin did not explicitly waive their immunity from prejudgment attachment.

#### IV.

This brings us to the final question presented on this appeal, namely, whether the district court correctly dissolved the injunction which enjoined negotiating the letters of credit. We hold that it did.

The short answer to S & S' argument that the district court should have continued the injunction is that such a measure could only have resulted in the

disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a "foreign state". Once the district court held -- correctly so in our opinion -- that the Romanian Bank and Masin were protected from prejudgment attachment by the FSIA, the court properly refused to sanction any other means to effect the same result. The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.

We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment. The injunction was properly dissolved.

Our stay of January 4, 1983, which continued the district court's stay of that part of its order of December 7, 1982 vacating the attachment, is dissolved.

The mandate shall issue forthwith.

Affirmed.

1. We previously have held that corporations in which the state has a majority interest are within the § 1603(b) definition. Carey v. National Oil Corp., 592 F.2d 673, 676 n.1 (2 Cir. 1979).
2. Domestic and International Business Administration, United States Department of Commerce, Overseas Business Reports 73-36, Trading and Investing in Romania 8 (Aug. 1973).
3. Aside from the fact that Edlow is not controlling on this Court, the evidence before that court is sharply distinguishable from that in the instant case. Edlow involved a Yugoslavian "work organization". The district court found that this "work organization" was not an "agency or instrumentality" of the Yugoslavian state, largely because a presumption of state ownership of all property--Yugoslavia being a socialist state--was the only proof of government ownership of control offered. As that court stated, "[t]he only basis, therefore, for concluding that NEK is an 'organ' of the Yugoslav government, or at least 50 per cent owned by the government, is that the state 'owns' all forms of property in Yugoslavia." 441 F. Supp. at 832.



4. Section 1610(a) in relevant part provides:

"(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

...."

## STATUTORY AND TREATY PROVISIONS

## 28 U.S.C. § 1609.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter.

## 28 U.S.C. § 1610.

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United

States or of a State after the effective date of this act, if --

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for

property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property --

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of

automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if --

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may

purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the

giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

## AGREEMENT

### Article IV

#### Business Facilitation

1. In accordance with applicable laws and regulations, firms, companies and economic organizations of one Party may open, establish and operate representations (as these terms are defined in Annex 3) in the territory of the other Party. Information concerning rules and regulations pertaining to such representations and related facilities shall be provided by each Party upon the request of the other.



2. Nationals, firms companies and economic organizations of either Party shall be afforded access to all courts and, when applicable, to administrative bodies as plaintiffs or defendants, or otherwise, in accordance with the laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions; they also shall not claim or enjoy immunities from taxation with respect to commercial or financial transactions, except as may be provided in other bilateral agreements.

3. Firms, companies and economic organizations of one of the Parties shall be permitted to engage in the territory of

the other party in any commercial activity which is not contrary to the laws of such other Party.

4. Firms, companies and economic organizations of either party that desire to establish representations or already operate representations in the territory of the other Party shall receive treatment no less favorable than that accorded to firms, companies and economic organizations of any third country in all matters relating thereto. The rights and facilities set out in Annex 2 shall be among those that will be accorded such firms, companies and economic organizations which establish representations.

5. For the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities, nationals of each Party and

employees of its firms, companies and economic organizations and their families shall be permitted to enter, to reside and to obtain appropriate housing in the territory of the other Party, and to travel therein freely, in accordance with the laws relating to entry, stay and travel of aliens.

6. The Parties affirm that no restrictions shall exist in principle on contracts between representatives of American and Romanian firms, companies and economic organizations. To this end, representatives of firms, companies and economic organizations of either Party shall be permitted within the territory of the other Party to deal directly with buyers and users of their products, for purposes of sales promotion and servicing their products, in accordance with the

procedures and regulations applicable in each country.

7. The Parties shall as appropriate permit and facilitate access within their territories by representatives of firms, companies and economic organizations of the other Party to information concerning markets for goods and services in accordance with the procedures and regulations applicable in each country.

8. Firms, companies and economic organizations of either Party shall be permitted in accordance with procedures and regulations applicable within the territory of the other Party to advertise, conclude contracts, and provide technical services to the same extent that firms, companies and economic organizations of the latter Party may do so. Duty-free treatment will be accorded to samples

without commercial value and advertising materials, as provided in the Geneva Convention of November 7, 1952, relating to the imposition of commercial samples and advertising material.

9. Each Party agrees to provide its good offices to assist in the solution of business facilitation problems and in gaining access to appropriate government officials in each country.

10. Each Party agrees to encourage the development on its territory of appropriate services and facilities and adequate access thereto and also to promote the activities of firms, companies and economic organizations of the other Party, which do not have representations, and their employees and representatives.

11. Each Party agrees to facilitate in its territory, to the fullest extent

practicable, the activities of firms, companies and economic organizations of the other Party acting through employees, technicians, experts, specialists and other representatives in carrying out contracts concluded between the firms, companies and economic organizations of the two Parties.

12. Each Party undertakes to facilitate travel by tourists and other visitors and the distribution of information for tourists.

13. The Parties confirm their commitment, as expressed in the Joint Statement on Economic, Industrial, and Technological Cooperation of December 5, 1973, to facilitate participation of their nationals, firms, companies and economic organizations in fairs and exhibitions organized in the other country. Each

Party further undertakes to encourage and facilitate participation by nationals, firms, companies and economic organizations of the other country in trade fairs and exhibits in its territory, as well as to facilitate trade missions organized in the other country and sent by mutual agreement of the Parties. Subject to the laws in force within their territories, the Parties agree to allow the import and re-export on a duty-free basis of all articles for use by firms, companies and economic organizations of the other Party in fairs and exhibitions, providing that such articles are not transferred.

## ORDERS BELOW

SUPREME COURT OF THE  
STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
S & S MACHINERY, CO., :

Plaintiff :

-against- :

Index No.  
16342/82

MASINEXPORTIMPORT, :  
a Romanian corporation,  
THE ROMANIAN BANK FOR :  
FOREIGN TRADE, :

ORDER OF  
ATTACHMENT

Defendants. :

-----X

Upon the summons and complaint and the affidavits of Saul Waller and Alfred R. Fabricant, Esq., both sworn to the 13th day of July, 1982, wherein it appears that causes of action for a money judgment exist in favor of the plaintiff and against the defendants, in the sum of at least \$913,962.97, and that the plaintiff is entitled to recover \$913,962.97 above all counterclaims known to it;



And it being further shown by said affidavits and complaint that the plaintiff is entitled to an Order of Attachment against the property of the defendants in accordance with the provisions of Section 6201(1) of the Civil Practice Law and Rules of the State of New York in that said defendants are foreign corporations not qualified to do business in the state of New York,

NOW, on motion of Shea & Gould, attorneys for the plaintiff, 330 Madison Avenue, New York, New York 10017, it is

ORDERED, that the plaintiff's undertaking be and the same hereby is fixed in the sum of \$156,339.00 , of which amount the sum of \$106,339.00 thereof is conditioned that the plaintiff will pay to the defendants all legal costs and damages, which may be sustained by

reason of the attachment if the defendants recover judgment or it is finally decided that the plaintiff was not entitled to an attachment of the defendants' property, and the balance thereof being the sum of \$50,000.00 conditioned that the plaintiff will pay to the Sheriff for the County of New York all of his allowable fees, and it is further

ORDERED, that the Sheriff for the County of New York upon the filing of plaintiff's undertaking as aforesaid shall levy within his jurisdiction at any time before final judgment upon such property in which the defendants have an interest and upon such debts owing to the defendants as will satisfy the plaintiff's demand of \$913,962.97, together with probable interest, costs and the fees and expenses of the Sheriff for the County of

New York for a total sum of \$1,042,146.00 and that he proceed thereon in the manner required by law, and it is further

ORDERED, that the plaintiff within five days after levy is made shall make a motion on notice to the defendants, garnishee and the Sheriff of the County of New York, for an order confirming the Order of Attachment; that upon such motion, the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy, and the probability that it will succeed on the merits; and that if no such motion is made, the Order of Attachment and any levy thereunder shall have no

further effect and shall be vacated upon motion.

Enter Within Ten Days

/s/

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J.S.C.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	
S & S MACHINERY CO.,	: Index No.
	: 82 Civ. 4890
	:
Plaintiff,	:
	:
-against-	: <u>ORDER</u>
	:
MASINEXPORTIMPORT, a	:
Romanian corporation,	:
THE ROMANIAN BANK FOR	:
FOREIGN TRADE,	:
	:
Defendants.	:
-----X	

Upon the petition and Order to Show Cause of defendants Masinexportimport and Romanian Bank for Foreign Trade dated July 27, 1982 and hearing on said petition and Order to Show Cause having been held on July 28, 1982 and all parties herein having been present in person or represented by counsel at said hearing, it is hereby:

ORDERED, that defendants' petition for removal of this action to the

United States District Court for the Southern District of New York from the Supreme Court of the State of New York, New York County, Index No. 16342/82, is hereby granted subject to the provisions for removal contained in the Federal Rules of Civil Procedure; and it is further

ORDERED, that the Order of Attachment entered on July 15, 1982 by the Supreme Court of the State of New York, County of New York, against the defendants herein is, subject to the further Order of this Court, adopted in all respects as the Order of this Court, except as expressly provided herein below; and it is further

ORDERED, that the parties herein reserve all of their rights under the Federal Rules of Civil Procedure and the CPLR specifically with respect to the rights of both defendants to challenge

personal jurisdiction as well as the validity of the attachment under the CPLR; and it is further

ORDERED, that the Order of Attachment entered in the Supreme Court of the State of New York, County of New York, with respect to defendant Romanian Bank for Foreign Trade is expressly amended to provide that only the assets, debts or other property of defendant Masinexport-import collected or to be collected, by the Romanian Bank for Foreign Trade at Bankers Trust Company which are listed below shall be subject to the attachment:

<u>L/C NUMBER</u>	<u>AMOUNT</u>	<u>PRESENTMENT DATE</u>
60379	\$200,163.28	July 19, 1982
	\$ 35,133.00	July 26, 1982
	\$ 6,976.82	August 2, 1982
60380	\$ 41,316.80	August 2, 1982

<u>L/C NUMBER</u>	<u>AMOUNT</u>	<u>PRESENTMENT DATE</u>
	\$ 17,384.41	August 16, 1982
	\$ 11,966.19	August 23, 1982
60381	\$153,880.17	July 19, 1982
	\$ 27,324.82	August 17, 1982
60861	\$ 21,207.84	August 25, 1982
60862	\$ 21,207.84	August 25, 1982
60863	\$ 21,207.84	August 25, 1982
60865	\$ 21,207.84	September 1, 1982
60596	\$ 94,945.64	August 23, 1982
	\$ 43,605.82	September 19, 1982

and it is further

ORDERED, that any assets, debts or property collected by the Romanian Bank for Foreign Trade including any funds in the process of collection on behalf of any and all clients of the Romanian Bank for Foreign Trade, except as specifically set forth in this Order, which have already been levied upon at the Bankers Trust Com-



pany shall be released immediately; and it is further

ORDERED, that any and all negotiation of drafts or other negotiable paper pursuant to the above-described letters of credit is hereby enjoined.

Dated: New York, New York  
July 29, 1982

S/S WHITMAN KNAPP  
WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x

THE CHASE MANHATTAN	:	
BANK, N.A.,	:	79 Civ.
	:	6644
Plaintiff,	:	(T.P.G.)
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
THE STATE OF IRAN, also known	:	
as ISLAMIC REPUBLIC OF IRAN,	:	
et al.,	:	
	:	
Defendants.	:	
- - - - -	:	

STATE OF SOUTH CAROLINA    )  
                                  : ss.:  
COUNTY OF BEAUFORT         )

STANLEY D. METZGER, being duly  
sworn, says:

1. I am and have been a member in  
good standing of the bar of New York for  
over forty years. I retired from the  
faculty of the Georgetown University  
School of Law in 1978 where I had been a

Professor of Law since 1960 specializing in international and administrative law.

2. From 1946 to 1960 I was a member of the Legal Adviser's Office of the United States Department of State. From 1952-1960 I was the Assistant Legal Adviser for Economic Affairs and was the attorney principally responsible for rendering legal advice to the principal drafters and coordinators of negotiations of the Treaties of Friendship, Navigation and Commerce ("FCN"). In or about 1950-51, when I served as Deputy Assistant Legal Adviser for Economic Affairs, I served on a special committee established by Jack Tate, then Deputy Legal Adviser, within the Legal Adviser's Office to consider and formulate policy and recommendations concerning the sovereign immun-

ity functions of the Department of State. Therefore, I am thoroughly familiar with the circumstances surrounding, and in 1950-51 I participated in, the drafting of the standard FCN treaty.

3. The Treaty of Amity, Economic Relations and Consular Rights, August 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 (the "Treaty of Amity") is based on the standard FCN treaty. The term "enterprise", as used in Article XI(4) of the Treaty of Amity, signifies an organization of government (whether in the form of a corporation, agency, or any other kind of instrumentality carrying on governmental activities) which is engaged in an undertaking involving commercial or business activities on essentially a continuing basis.

4. The term encompasses the government, its staff and ministries when it engages in a commercial activity which in the forum state is usually performed by private interests.

5. Under Article XI(4) of the Treaty of Amity, neither Bank Markazi Iran ("Markazi") nor the Government of Iran enjoys total immunity under any and all circumstances. To the extent that Markazi carries out normal central banking functions, it would enjoy immunity. But, to the extent Markazi carries out commercial banking activities, it does not enjoy immunity. Similarly, the Government of Iran would not enjoy immunity to the extent that it carries out commercial activity which is traditionally performed by private parties in this country. If,

for example, business activity of the government of Iran was directed out of the Prime Minister's office directly, rather than through a particular ministry or agency, Article XI(4) would apply and the government would not be entitled to immunity.

6. I am responsible for adding the phrase "including corporations, associations and government agencies or instrumentalities" in the sovereign immunity provision of the standard FCN treaty, which appears in Article XI(4) of the Treaty of Amity. This phrase was not included in earlier treaties, such as the Irish Treaty of 1950 (T.I.A.S. 2155). In the Irish Treaty, the provision (Article XV(3)) reads:

No enterprise of  
either party which is  
publicly owned or con-

trolled shall, if it  
engages in commercial,  
manufacturing, processing,  
shipping or other business  
activities within the  
territories of the other  
Party claim or enjoy . . .

This language was capable of being read as limited to separately incorporated state-trading operations, such as KLM, the Dutch government-owned airline company, and similar institutions, and hence as not covering agencies or other government instrumentalities engaging in "commercial . . . or other business activities." I suggested the addition of the "including" language because the formulation in the Irish Treaty, in my view was too limited and too likely to exclude a large number of government activities competitive with private persons. These latter activities would thus be able to enjoy a privileged

position with respect to a normal cost of operation (i.e. cost of litigation, taxation) which it was the purpose of the provision to remove. That there were many governments engaging in such activities through ministries was clear, and it seemed to make no sense to be ambiguous, at best, as to them.

7. The addition of the "including" language should also be understood in the context of the newly evolving restrictive theory of sovereign immunity as formally announced in the Tate Letter of 1952. In 1950-51 I worked on a special committee established by Jack Tate (supra ¶ 2) which recommended that the United States adopt the restrictive, as opposed to the absolute theory, of sovereign immunity. Under the restrictive theory of immunity,



traditional governmental acts would continue to immunize governments from suits, but when they engaged in commercial activities, they were to be treated no more favorably than when a private party was so engaged. Subsequently, by means of the Tate Letter, the Department of State publicly announced that it was taking this approach. I had the Tate Letter approach very fresh in mind when I proposed the "including" phrase. I intended that just as the Tate Letter had made no distinctions among governmental organs engaging in private acts, so should the FCN treaty make no distinctions based on form -- it too should look at substance -- and if the government engaged in commercial or other business activities on a more or less regular or continuing basis (connoted by

the term "enterprise"), it should receive no special advantage over private parties. The formulation of the FCN treaty provision on sovereign immunity without this "including" phrase was too limited and too susceptible of being read to deal only with entitites organized outside ministries or government branches, excluding a large number of government activities competitive with private persons.

8. Article XI(4) of the Treaty of Amity may encompass suits against governmental entities which do not necessarily make a profit in the ordinary sense of the term. For example, it would clearly apply to the commercial banking functions of a central bank, which compete with private banks, and generate gains, the normal counterpart of profits.

9. Article XI(4) of the Treaty of Amity imposes no requirement that there be a nexus between the commercial or business activity and the claim asserted in a suit. Nor am I aware that there was any attempt to define the phrase "engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party." The State Department's position, as I understood it, was that all such questions would be answered in terms of the circumstances of concrete cases as they arose. American negotiators were aware of the evolving judicial doctrines (i.e. United States v. Scophony Corp., 333 U.S. 795 (1948)), which found foreign companies to be engaged in business in the United States through subsidiaries, for example,

under certain circumstances. They were aware that the individual circumstances were often decisive and that the law was developing in a way that was enlarging the reach of the forum state. However, these issues were regarded as matters for the courts to decide applying general existing legal principles to cases regardless whether the defendant was a private person or a government organization covered by Article XI(4).

10. As I have previously explained (supra ¶6), Article XI(4) of the Treaty of Amity was intended to insure that to the extent that governments and their agencies and instrumentalities were engaged in commercial activities they would not enjoy a privileged position with respect to the normal costs of operation such as the

costs of litigation and taxation. Indeed, the last clause of Article XI(4) expressly waives immunity from "taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject". Prejudgment attachment is an "other liability" incidental to the cost of litigation. So just as private parties are subject to prejudgment attachment as one aspect of the cost of litigation, Article XI(4) was intended to waive immunity from prejudgment attachment of the property of the government, its agencies and instrumentalities which property is used in a business activity in which the government, agency or instrumentality engages. A levy of attachment would reach assets of the Government of Iran and Markazi used in the

performance of commercial activities  
normally engaged in by private parties in  
this country.

/s/Stanley D. Metzger  
Stanley D. Metzger

Sworn to before me  
on August 18, 1980

/s/  
Notary Public

My Commission Expires: 2-8-8\_